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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

ALFRED SHORT,

Petitioner,

VERSUS

CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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36 pp

QUESTIONS PRESENTED

1. Does the petitions clause of the First Amendment require a showing that the petition is of public concern in order for it to be protected by the First Amendment?

2. Are complaints of race discrimination by a public employee to a public agency "speech" protected by the First Amendment?

3. Does the First Amendment petitions clause permit a public employee to be discharged because he filed a race discrimination charge with a government agency?

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Mississippi holding that a complaint of race discrimination to a government agency by a public employee is not protected by the First Amendment is attached as Appendix "A." The Order of the United States District Court granting summary judgment for Respondents on Mr. Short's claim of a violation of the First Amendment by retaliating against him for the filing of an EEOC charge for race discrimination is attached as Appendix "B." The unpublished opinion of the United States Court of Appeals for the

Fifth Circuit also holding that a complaint of race discrimination by a public employee to a government agency is not protected by the First Amendment is attached as Appendix "C."

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit entered on August 29, 1997 through Writ of Certiorari under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved is United States Constitution, Amendment One which says:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

On November 1, 1994, Alfred Short, a black firefighter employed by the City of West Point, Clay County, Mississippi, filed a charge with the Equal Employment Opportunity Commission alleging his race kept him from obtaining a promotion. The EEOC charge reads:

> On or about October 15, 1994, I learned that I had not

> been selected for the promotional position of Pump Operator.
> Chief Richard Stripling has not given me a reason as to why I was not selected.
> I believe that I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended, because:
> A White fire fighter was promoted who was not better qualified for the position than I am. He failed the promotional test for the position, I passed with the highest score.

Appendix A, p. 3.

Officials of the City of West Point expressed their disapproval of the filing of the EEOC charge. The West Point Fire Chief told Mr. Short:

> Well, since you filed a charge with the EEOC, you are just digging a hole for yourself with the City.

R., p. 212.

The City of West Point's Chief Administrative Officer responded to Mr. Short's complaint about his not getting the promotion by saying:

> The City might have listened to me (Short) except I filed the EEOC charge.

R., p. 149.

On March 8, 1995, the City of West Point Mayor recommended Mr. Short be fired and the Board of Aldermen approved the discharge at its next meeting.[1] R., pp. 148-149.

---

[1]The City claims Short was not fired for filing the EEOC charge, but because he is not a Clay County

Mr. Short then filed suit on several theories, including his claim that he was fired in retaliation for exercise of his First Amendment rights by the filing of the EEOC charge. R., pp. 1-3. Respondents moved for summary judgment, and on December 19, 1996, the District Court granted the motion on all of Petitioner's claims except the claim that his First Amendment rights were violated by discharging him in retaliation for filing an EEOC charge. R., pp. 276-277.[2] After directing further briefs, the District Judge also dismissed the First Amendment retaliation claim, holding that a public employee's filing of an EEOC charge of race discrimination against a public entity is not protected by the First Amendment because it is not of public concern.

The United States Court of Appeals for the Fifth Circuit affirmed, agreeing that the First Amendment did not protect the filing of the EEOC charge.

ARGUMENT I

THE WRIT SHOULD BE GRANTED BECAUSE THE CIRCUITS ARE DIVIDED ON THE ISSUE OF WHETHER THE FIRST AMENDMENT'S PETITIONS CLAUSE IS SUBJECT TO THE "PUBLIC CONCERN" ANALYSIS APPLICABLE IN CASES BROUGHT UNDER THE "SPEECH" CLAUSE OF THE FIRST AMENDMENT.

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resident. Short claims he is a Clay County resident and this assigned ground for discharge is a pretext. The factual issue of the real reason for the discharge is not involved in this Petition.

[2]The District Court's opinion of December 1996 is not included in the Appendix, since the matters discussed are not involved in this Petition. The primary basis for the dismissal order of December 1996 was Short's failure to file his complaint within 90 days of the EEOC right-to-sue letter as required by Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-5(f)(1).

The Circuits are divided on the issue of whether the First Amendment Petitions Clause is subject to the "public concern" analysis applicable in employee speech cases. In affirming the dismissal, the Fifth Circuit followed its earlier precedents in Ayoub v. Texas A & M Univ., 927 F.2d 834 (5th Cir. 1986), cert. denied 479 U.S. 1064 (1987) and Rathjen v. Litchfield, 878 F.2d 836 (5th Cir. 1989), which held that the petitions clause of the First Amendment does not protect a public employee who files a grievance with a government agency unless the grievance is of public concern.

The Third Circuit held otherwise in San Filippo v. Bongiovanni, 30 F.3d 424, 440-43 (3d Cir. 1994):

> But when government - federal or state - formally adopts a mechanism for redress of these grievances for which the government is allegedly accountable, it would seem to undermine the Constitution's vital purposes to hold that one who in good faith files an arguably meritorious "petition" invoking the mechanism may be disciplined for such invocation by the very government that in compliance with the petition clause has given the particular mechanism its Constitutional imprimatur.

30 F.3d at 442-443.

The Third Circuit is correct, and the Fifth Circuit's denial of First Amendment protection is a serious misapplication of Connick v. Myers, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). In Connick, Assistant District Attorney Shelia Myers lost her case because:

> The limited First Amendment interest involved here does not require that (District Attorney) Connick tolerate action which she reasonably believed would disrupt the office, undermine his authority and destroy close working relationships. Myers' discharge, therefore, did not violate the First Amendment.

75 L.Ed.2d at 724; 461 U.S. 138.

Public employee Myers lost because the "balancing" weighed in favor of workplace harmony:

> The problem...was arriving "at a balance" between the interest of the employee as a citizen in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public service that it performs through its employees.

75 L.Ed.2d at 715; 461 U.S. 138.

The Connick v. Myers, "balancing" is inappropriate when the employee's speech consists of filing an EEOC charge. Congress has specifically authorized employees to file EEOC charges, 42 U.S.C. § 2000e-5(e), and has made it unlawful to retaliate against those who file them. 42 U.S.C. § 2000e-3(a). By providing that retaliation for the filing of EEOC charges is unlawful, Congress has decided that employers do not have a recognizable interest in promoting the efficiency of the service by punishing employees who file EEOC charges. While the filing of an EEOC charge might undermine employee morale, or cause disharmony at the work place, Congress recognizes no legitimate Government interest in

punishing one for filing a charge.

By outlawing retaliation for the filing of the charge, Congress has decided that there is nothing against which the employee's interest in free speech is to be balanced. Absent a legitimate employer interest, there is no "balancing" to be done. Thus, the First Amendment's protection of the right to petition outweighs the Government's interest in promoting the "efficiency of the service" by firing an employee because he filed a charge.

The Fifth Circuit, in incorrectly disagreeing with the Third Circuit, has applied Connick when its rationale cannot be logically adapted to a case brought under the petitions clause.

ARGUMENT II

THE WRIT SHOULD BE GRANTED BECAUSE THE FIFTH CIRCUIT HAS IGNORED PRECEDENTS FROM THIS COURT CONSTRUING THE TERM "PUBLIC CONCERN."

Besides the failure to recognize that Connick v. Myers "balancing" has no application in a petitions case, the Fifth Circuit has also ignored precedents from this Court by adopting an overly restrictive definition of "public concern." The Fifth Circuit, in this case, held that a public employee's complaints of race discrimination made to a Government agency are not of public concern. This Court has held otherwise in Connick v. Myers, supra:

> Most recently, in Givhan v. Western Line Consolidated School District, 439 U.S. 410, 58 L.Ed.2d 619, 99 S.Ct.

> 693 (1979), we held that First Amendment protection applies when a public employee arranges to communicate privately with his employer, rather than to express the views publicly. Although the subject matter of Mr. Givhan's statements were not the issues before the Court, it is clear that his statements concerning the school district's allegedly racial discrimination policy involved a matter of public concern.

75 L.Ed.2d at 719. This Court having held that private complaints of race discrimination are of "public concern." This Court's supervisory authority should be invoked in order to correct the Fifth Circuit for holding to the contrary.

Respectfully submitted,

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CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point

Respondents,

APPENDIX A

JIM WAIDE
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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT, PLAINTIFF

VS. CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants for summary judgment as to the plaintiff's First Amendment retaliation claims. The defendants filed with the court a motion for summary judgment on October 15, 1996, and requested that a judgment as a matter of law be granted in their favor as to the plaintiff's First Amendment claims, in addition to the plaintiff's remaining claims. However, the defendants did not raise in their motion or supporting brief the argument that the plaintiff's speech was not constitutionally protected because it did not involve a matter of public concern. Indeed, this premise for dismissal was not outlined until the defendants filed their rebuttal brief. The court granted the defendants' motion in part, but allowed the plaintiff additional time in which to respond to the defendants' public concern argument. Short v. City of West Point, et al., Cause No.

1:95CV359-D-D (N.D. Miss. Dec. 17, 1996) (Davidson, J.) (Memorandum Opinion and Order Granting in Part Motion for Summary Judgment). The plaintiff has so responded and the defendants have filed their rebuttal brief as to this issue. The matter is now ripe for determination.

LEGAL DISCUSSION[1]

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ. P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Vera v. Tue, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct.

[1]This court has previously set forth the full factual underpinnings of this cause of action and declines to do so again. Short v. City of West Point, et. al., Cause No. 1:95CV359-D-D, pp. 2-3 (N.D. Miss. Dec. 17, 1996) (Davidson, J.) (Memorandum Opinion). Only facts relevant to the issue to be decided will be related as necessary.

2505, 2511, 91 L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); Federal Sav. & Loan Ins. v. Krajl, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. Banc One Capital Partners Corp. v. Kniepper, 67 F.3d 1187, 1198 (5th Cir. 1995); Matagorda County v. Russel Law, 19 F.3d 215, 217 (5th Cir. 1994).

II. FIRST AMENDMENT PROTECTION

In its simplest terms, the issue before the court is whether the defendants violated the First Amendment when they allegedly retaliated against the plaintiff for his filing of an EEOC charge based upon race discrimination. The claim brought before the EEOC reads:

> On or about October 15, 1994, I learned that I had not been selected for the promotional position of Pump Operator.
>
> Chief Richard Stripling has not given me a reason as to why I was not selected.
>
> I believe that I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended because:
>
> A White fire fighter was promoted who was not better qualified for the position than I am. He failed the pro-

> motional test for the position, I passed with the highest score.[2]

EEOC Charge, Exh. F att. Plaintiff's Response to Defendants' Motion for Summary Judgment. The plaintiff submits two premises in support of his opposition to the defendants' motion. First, Short contends that his EEOC charge alleging racial discrimination by a public body involves a matter of public concern and that retaliation related to the charge thus violates the "free speech" portion of the First Amendment. Second, the plaintiff urges that he is protected from retaliation related to the making of the EEOC charge by the "petition for redress of grievances" portion of the First Amendment without regard to whether the EEOC charge implicates a matter of public concern.

A. *Free Speech*

The plaintiff does not dispute that the free speech clause of the

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[2]In his brief to the court on the retaliation claim, the plaintiff states that the full text of the EEOC charge reads:

> I have been employed as a fire fighter EMT for two years and ten months. On or about August 30, 1994, I, along with seven others, took the test for promotion to pump operator. I was the only Black. According to the scoring, I was one of the two to pass the test. About two weeks after the test, we were interviewed by Chief Richard Stripling, and City Councilman Jessie Harmon.
> On or about October 15, 1994, I learned that the position had been filled. Ton [sic] Lawson (W) was promoted. Tony took the test with me and he was not one of the ones who passed. There were about five promotions made around that same time, all were White. I believe that I have been discrimination [sic] against because of my race, Black. I am better qualified for the position than Tony, I passed the test, he did not.

Plaintiff's Brief on Whether Retaliation for Filing an EEOC Charge of Racial Discrimination Violates the First Amendment ("Plaintiff's Brief on Retaliation") at 1-2. The plaintiff provided the court with no citation subsequent to this quote referencing from whence it was taken. The text of the EEOC charge attached as Exhibit F to Plaintiff's Response to Defendants' Motion for Summary Judgment is quoted above in the body of the opinion. Although differences exist between the two quotes, these discrepancies have no impact on this court's application of the public concern test to the context of the EEOC charge. The court would reach the same decision interpreting either quote.

First Amendment only protects a public employee from retaliation relating to his speech if that speech involves a matter of public concern. Wallace v. Texas Tech. Univ., 80 F.3d 1042, 1050 (5th Cir. 1996). As this issue is not in contention, the court shall first address whether the petition clause is also subject to the public concern prerequisite before the court concerns itself with whether or not the speech in question actually embraces a matter of public concern.

B. *Petition for Redress of Grievances*

The First Amendment provides that

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. I. The plaintiff contends that the final clause of the First Amendment affords him protection from retaliation for his filing a charge of racial discrimination with the EEOC. He further submits that this protection remains intact irrespective of whether or not his EEOC charge contains material of concern to the public. In support of his assertions, the plaintiff relies upon a Third Circuit case styled San Filippo v. Bongiovanni, 30 F.3d 424, 440-43 (3d Cir. 1994). After a thorough analysis of Supreme Court precedent and opinions by other circuit courts addressing the same

issue, the Third Circuit held the Connick public concern threshold[3] inapplicable to the petition clause of the First Amendment. San Filippo, 30 F.3d at 442. Instead the court endorsed a more lenient standard: First Amendment immunity is invoked if the petition is "non-sham," irrespective of whether the petition addresses a matter of public concern. Id. at 443 ("The mere act of filing a non-sham petition is not a constitutionally permissible ground for discharge of a public employee.").

The Third Circuit recognized, however, that

> each circuit court to consider the issue has held that a public employee who alleges that he or she was disciplined in retaliation for having filed a lawsuit against his or her employer does not state a claim under § 1983 unless the lawsuit addressed a matter of public concern.

Id. at 440 (citing cases). Two of the cases cited in support of that statement were Fifth Circuit cases. Id. at 440 n.19 (citing Day v. South Park Indep. Sch. Dist., 768 F.2d 696, 703 (5th Cir. 1985), cert. denied, 474 U.S. 1101, 106 S. Ct. 883, 88 L.Ed.2d 918 (1986); Rathjen v. Litchfield, 878 F.2d 836, 842 (5th Cir. 1989)). In Day, an untenured high school teacher filed a § 1983 action against the school district. Day claimed that she was unconstitutionally

[3]Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983). As discussed more thoroughly infra, the Connick Court held that the First Amendment only protects a governmental employee from retaliation based on expressive conduct constituting speech when the speech in question addresses a matter of "public concern." If the text of the speech may be interpreted to encompass a matter of concern to the public, then the court must balance the state's interest as an employer in promoting the efficiency of its workplace against the employee's interest as a citizen in commenting upon matters of public concern. Connick, 461 U.S. at 142, 103 S. Ct. at 1687.

discharged in violation of the First Amendment in retaliation for her protestations concerning the principal's unfavorable evaluation of her performance. Day, 768 F.2d at 697-99. When the appellate court affirmed the trial court's determination that Day's complaint to her supervisor concerned a purely private matter and thus fell outside the ambit of protected free speech, Day argued that the petition clause guarantees her a right separate and distinct from that set forth in the free speech clause. Id. at 701. The Fifth Circuit disagreed:

> [Day's argument] assumes that, when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.[4]

Id. The court went on to note the absurdity of allowing First Amendment immunity when an employee has the foresight to clothe a personal complaint with a formal grievance, but disallowing such protection when the employee voices personal displeasure outside that protected forum.

> An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it

[4]See, e.g., McDonald v. Smith, 472 U.S. 479, 482-85, 105 S. Ct. 2787, 2789-91, 86 L.Ed.2d 384 (1985) ("The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression . . . . The Petition Clause was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. . . . These First Amendment rights are inseparable. . . .").

is when spoken to him.

Id. at 703. The Day Court, however, specifically noted that it left unaddressed "the situation that would be presented if a government employee sought assistance from a legislator or a member of the executive branch in a position to accord her relief who was not in the direct supervisory hierarchy." Id. The facts of the case sub judice are more closely analogous to the matter the Day Court left unaddressed. Short directed his grievance to the EEOC, a body certainly outside the control of Short's employer.

The Fifth Circuit came closer to addressing the matter in Brinkmeyer v. Thrall Indep. Sch. Dist., 786 F.2d 1291 (5th Cir. 1986). The facts of Brinkmeyer are similar to those of Day, except the teacher's aide in Brinkmeyer filed a lawsuit against the school district before she was actually fired. When the school district later terminated her employment, it listed her failure to make a good faith effort to resolve the matter before filing suit as one of the reasons justifying her discharge. Brinkmeyer, 786 F.2d at 1293-94. Brinkmeyer then filed a second lawsuit for wrongful discharge which the court consolidated with the first. Id. at 1294. The district court granted the defendants' motions for summary judgment holding that neither Brinkmeyer's conversations with her supervisor nor the filing of her first lawsuit met the Connick prerequisite of pertaining to a matter of public concern. Id. The Fifth Circuit

reversed and stated that under the summary judgment standard of viewing the evidence in the light most favorable to the nonmovant, the district court erred when it held at that procedural juncture that Brinkmeyer's speech did not touch upon a matter of public concern. Id. at 1295. Furthermore, the appellate court noted that

> the district court held that Brinkmeyer's right of access to the courts under the first amendment was barred by Connick. The district court's conclusion, however, appears based in part on its holding that the speech Brinkmeyer sought to protect in her initial action was not of public concern. On remand, the district court should reconsider its holding in light of this court's opinion.

Id. at 1295-96 (citing cases).[5] By not specifically addressing the matter, the Brinkmeyer Court implicitly agreed with the lower court's determination that the petition clause of the First Amendment is also subject to the Connick public concern prerequisite.

The Fifth Circuit ultimately put to rest in Rathjen v. Litchfield the issue of whether the public concern test applies to the petition clause. 878 F.2d 836 (5th Cir. 1989). Rathjen, an employee of the City of Houston, filed a lawsuit against the City after the City demoted her. Her working conditions continued to deteriorate after the filing. Rathjen, 878 F.2d at 837-38. Following a jury verdict in

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[5]The Fifth Circuit cited the following cases for comparison: Day, 768 F.2d at 702; Altman v. Hurst, 734 F.2d 1240, 1244 & n.10 (7th Cir.) ("[A] private office dispute cannot be constitutionalized merely by filing a legal action . . . ."), cert. denied, 469 U.S. 982, 105 S. Ct. 385, 83 L.Ed.2d 320 (1984); Renfroe v. Kirkpatrick, 722 F.2d 714 (11th Cir.), cert. denied, 469 U.S. 823, 105 S. Ct. 98, 83 L.Ed.2d 44 (1984).

favor of Rathjen, the City appealed and argued that Rathjen's claim of retaliation for protesting her demotion and filing the lawsuit did not give rise to a federal cause of action. Id. at 841. The Fifth Circuit agreed. Id. The Rathjen Court noted that the Supreme Court

> established that the first amendment does not prevent a government employer from taking action in response to an employee's expression that does not touch upon a matter of public concern.

Id. (citing Connick, 461 U.S. at 146, 103 S. Ct. at 1690).

> . . .*The law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit.*

Id. at 842 (emphasis added). The specific query facing the court was whether or not Rathjen's resistance to her demotion *"or her filing of [the] lawsuit"* embraced matters of public concern. Id. (emphasis added). The court found that Rathjen's actions were of no concern to the public as set forth in Connick and reversed the lower court's judgment.

Thus, the Fifth Circuit in Rathjen determined that an employee is only entitled to First Amendment protection from retaliation for the filing of a lawsuit if the subject of that suit is of concern to the public. Based on this binding precedent, the court is of the opinion that the petition clause of the First Amendment is subject to the Connick public concern prerequisite.[6] The undersigned can discern

[6]The plaintiff states in his brief to the court that "the Fifth Circuit has implicitly held that filing a fed-

no reason justifying the application of the Connick prerequisite to the filing of a lawsuit, but not to the filing of an EEOC complaint, as in the subject case. Indeed, the Fifth Circuit has stated that there is no difference between retaliation based on the filing of a lawsuit and retaliation grounded on the filing of a grievance. Rathjen, 878 F.2d at 842. As such, the text of Short's EEOC charge must embrace a matter of concern to the public in order to warrant protection under the First Amendment for retaliation based on the filing of that charge, regardless of whether that protection is sought under the free speech clause or the petition for redress of grievances clause.

III. MATTER OF PUBLIC CONCERN

The court has determined that the plaintiff is entitled to the shield of First Amendment protection for retaliation based upon his filing of an EEOC charge only if the charge contains a matter of concern to the public. This holding applies irrespective of whether the protection sought arises under the free speech clause or the right to petition for redress of grievances clause. In determining whether speech involves a matter of public concern, courts must look to the content, form, and context of the speech. Wallace, 80 F.3d at 1050 (citing Thompson v. City of Starkville, 901 F.2d 456,

eral lawsuit is protected by the First [A]mendment without discussing whether the contents of the lawsuit contained any matter of public concern." Plaintiff's Brief on Retaliation at 5. In support of this statement, the plaintiff cites Enlow v. Tishomingo County, 962 F.2d 501 (5th Cir. 1992). After reading the Enlow decision, the undersigned disagrees with the plaintiff's interpretation of any implicit holding in that case with regard to the issue involved in this retaliation claim.

461 (5th Cir. 1990)).

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
>
> [W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 146, 147, 75 L.Ed.2d at 719, 720.

The plaintiff asserts that

> the motivating factor for the filing of the EEOC charge was Short's own concern about his not being promoted. On the other hand, the EEOC charge would be of interest to the public since it complains about a subject of great national debate, race discrimination, and because it indicates that the City is making employment decisions for reasons other than merit.

Short's Brief on Retaliation at 2. The plaintiff further asseverates that the Supreme Court has spoken to this issue and has held that complaints about racial discrimination are inherently matters of public concern. See Givhan v. Western Line Consolidated Sch. Dist., 439 U.S. 14, 99 S. Ct. 693, 58 L.Ed.2d 619 (1979). The context of the speech in Givhan, which speech the Court held protectable under the First Amendment, is clearly distinguishable from

the context of the speech in the case sub judice. In Givhan, the plaintiff privately criticized her employer's practices and policies, which she perceived to be racially discriminatory. Givhan, 439 U.S. at 412-13, 58 L.Ed.2d at 622-23. Givhan spoke out, albeit in private, as a citizen on a matter of general public concern and the Supreme Court specifically noted that her speech was "not tied to a personal employment dispute." Connick, 461 U.S. at 148 n.8, 75 L.Ed.2d at 721 n.8.

In this case, Short has not spoken out as a citizen generally concerned about racial discrimination within the upper echelons of the City of West Point, but instead has spoken only as an employee distressed with how his employer's allegedly racially discriminatory practices have affected him alone. The Fifth Circuit addressed a similar scenario concerning alleged discrimination on the basis of national origin in Ayoub v. Texas A & M Univ., 927 F.2d 834 (5th Cir. 1991). In that case, Ayoub, an Egyptian-born professor employed by Texas A & M University ("University"), consistently complained about the University's pay system. Ayoub, 927 F.2d at 835-36. When his office was relocated to a less than desirable locale, Ayoub filed suit alleging retaliation based upon his objections to the University's allegedly discriminatory pay scale. Id. The Fifth Circuit held that Ayoub's speech did not involve a matter of public concern. Id. at 837. Although the plaintiff protested the

University's allegedly two-tier pay system (one pay scale for white, native-born professors and a second pay scale for foreign-born professors), he only did so in reference to how it applied to him. Id. The appellate court noted that

> Ayoub consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest. Certainly, Ayoub never attempted to air his complaints in a manner that would call the public's attention to the alleged wrong.
>
> In sum, there is no evidence that Ayoub expressed concern about anything other than his own salary. *Although pay discrimination based on national origin can be a matter of public concern, in the context in which it was presented in his case by Ayoub, it was a purely personal and private matter.* As we found in Terrell,[7] Ayoub was not retaliated against, if he was at all, "for speaking 'as a citizen upon matters of public concern,' or for 'speak[ing] out as a citizen on a matter of general concern, *not tied to a personal employment dispute.*'"

Id. at 837-38 (quoting Terrell, 792 F.2d at 1363 (citations omitted) (last emphasis in original)).

The reasoning of Ayoub also precisely applies to the context in which Short's speech was made. Short's EEOC charge only decries allegedly racially discriminatory practices of the City of West Point as *they specifically applied to Short.* Short alleges that he was not promoted to the position of Pump Operator, even though amply qualified, simply because he is a black man. As in Ayoub, while

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[7] Terrell v. University of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1982).

City promotions based on race can be a matter of public concern, in the context in which Short presented his complaint, his speech only touched on a purely personal and private matter.

Furthermore, the court is unconvinced by the plaintiff's attempt to distinguish Ayoub on the basis of which suspect class is at issue. The plaintiff submits that

> [n]otwithstanding the public policy against discrimination based upon national origin, it is hardly arguable that discrimination in pay based on national origin raises the grave public debate as does [sic] issues of race discrimination. After all, race discrimination is a subject over which the nation has fought a great civil war, and upon which such matters as "affirmative action". . . even now invoke rigorous debate.

Plaintiff's Brief on Retaliation at 3. Neither the Supreme Court nor the Fifth Circuit has ever made such a distinction and this court refuses to do so here. The test set out in Connick and consistently cited by courts is whether the plaintiff speaks as a *citizen* upon matters of public concern or as an *employee* upon matters only of personal interest. Based upon the reasoning in Ayoub, this court is constrained to hold that Short spoke only as an employee upon a matter of personal interest. As such, his retaliation claims must fail as a matter of law because his speech does not involve a matter of public concern.

CONCLUSION

It is undisputed that First Amendment protection for retaliation

based on expressive conduct constituting speech only arises under the "free speech" clause when the speech in question involves a matter of public concern. Based on Fifth Circuit precedent, this court holds that the public concern prerequisite also extends to any protection awarded under the "petition for redress of grievances" clause. Because Short's speech in question, his EEOC charge of racial discrimination, only touches upon a personal and private matter instead of embracing a matter of public concern, the court finds that Short has failed to state a federal retaliation claim under either the free speech clause of the petition clause of the First Amendment. The defendants are entitled to a judgement as a matter of law as to the plaintiff' s retaliation claims.

A separate order in accordance with this opinion shall issue this day.

THIS the 21st day of January 1997.

United States District Judge

No.

In The

Supreme Court of the United States

October Term, 1997

ALFRED SHORT,

Petitioner,

VERSUS

CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point,

Respondents.

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ALFRED SHORT — PLAINTIFF

VS. — CAUSE NO. 1:95CV359-D-D

CITY OF WEST POINT, MS and
RICHARD STRIPLING, Individually
and in his Official Capacity as
Fire Chief of the City of West Point — DEFENDANTS

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AGAINST THE PLAINTIFF'S FIRST AMENDMENT CLAIMS

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motion for summary judgment against the plaintiff's First Amendment claims finds the motion well taken and shall grant it. Therefore, it is ORDERED that:

1) the defendants' motion for summary judgment as to the plaintiff's First Amendment retaliation claims is hereby GRANTED.

2) the plaintiff's claim for retaliation under the "free speech" clause of the First Amendment is hereby DISMISSED.

3) the plaintiff's claim for retaliation under the "petition for redress of grievances" clause of the First Amendment is hereby DISMISSED.

All memoranda, depositions, affidavits and other matters considered by the court in granting the defendants' motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED this 21st day of January 1997.

United States District Judge

No.

In The

Supreme Court of the United States

October Term, 1997

ALFRED SHORT,

Petitioner,

VERSUS

CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point

Respondents.

APPENDIX C

JIM WAIDE
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-60086

Summary Calendar

ALFRED SHORT, *Plaintiff-Appellant,*

versus

CITY OF WEST POINT, MISSISSIPPI;
RICHARD STRIPLING, *Defendants-Appellees.*

Appeal from the United States District Court
For the Northern District of Mississippi
USDC No. 1:95-CV-359-D-D

Before KING, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:*

Alfred Short appeals the district court's grant of summary judgment in favor of defendants. Short attempts to convince us that the filing of his EEOC charge is protected speech under the First Amendment. We disagree and affirm the decision of the lower court.

Short began working for the City of West Point Fire Department on January 16, 1992, as a firefighter/EMT. At the time, he was residing in Macon, Noxubee County, Mississippi. An explicit qualification for employment in the West Point Fire Department was

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

residence in Clay County. In July of 1994, a position as Engineer/Pump Operator opened at the Fire Department. Short applied for the job and made the highest grade on the test, but he did not get the promotion. The men promoted had several years more experience than Short and were white.

On November 1, 1994, Short filed an EEOC charge. The EEOC, however, found that the other two applicants were more qualified and issued a right-to-sue letter. By the time Short filed his Title VII claim, the statute of limitations had run.

Short was fired for failing to comply with the residency regulation. On November 24, 1995, he filed this suit, which alleges both race discrimination and a violation of the First Amendment. The district court granted summary judgment to the defendants on the race discrimination claim, and Short has not appealed that ruling. In his remaining claim, Short asserts that the filing of an EEOC charge is protected under the First Amendment and that his firing constitutes an unconstitutional retaliatory action on the part of West Point.

This case is controlled by Ayoub v. Texas A&M Univ., 927 F.2d 834 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 107 S.Ct. 948 (1987). In Ayoub, the plaintiff filed a discrimination complaint based on his belief that he was paid a salary that reflected a discriminatory pay scale that penalized foreign-born professors and

rewarded white, American professors. Additionally, he claimed that his office was relocated in retaliation for engaging in constitutionally protected speech: the filing of an EEOC charge. We held that Ayoub's speech was not protected because it did not address a matter of public concern. Lodging a complaint with the EEOC, without further airing of grievances, creates a private, personal dispute between employer and employee. It does not create a generalized petition for a remedy to a public problem. Id. at 837-838.

Short also relies on the theory that the First Amendment gives special protection to EEOC claims. This argument rests on the view that 42 U.S.C. § 2000e-3(a) affords unqualified protection to the filing of these claims. However, we held in Rathjen v. Litchfield that "[t]he law is no different where the act which allegedly gave rise to the retaliation claim is the filing of a grievance or a lawsuit." 878 F.2d 836, 842 (5th Cir. 1989). Both are subject to the qualification that the complaint be a matter of public concern. This type of speech is not protected by the First Amendment because it concerns merely personal employment status.

AFFIRMED.

Supreme Court, U.S.
FILED
DEC 18 1997
CLERK

No. 97-824

In The

Supreme Court of the United States

October Term, 1997

ALFRED SHORT,

Petitioner,

vs.

CITY OF WEST POINT, MS and RICHARD STRIPLING, individually and in his official capacity as Fire Chief of the City of West Point,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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APPENDIX

Appendix A — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Mississippi, Eastern Division Filed December 19, 1996 ..... 1a

STATEMENT OF THE CASE

On January 21, 1997, the United States District Court for the Northern District of Mississippi summarily dismissed Petitioner's First Amendment petition claim. In dismissing his claim, the district court found that any request for protection under the petition clause of the First Amendment required that the Petitioner come forward with proof of a public concern. The court then held that the claim of Petitioner, his EEOC charge of racial discrimination, only touched upon a personal and private matter and that, therefore, Petitioner's claim under the petition clause of the First Amendment should be dismissed as a matter of law. Petitioner timely appealed and the Fifth Circuit, for essentially the same reasons as the district court, affirmed the dismissal. Petitioner then filed this Petition for Writ of Certiorari.

His petition raises two arguments. First, Petitioner claims that a writ should be granted because circuits are divided on the issue of whether the First Amendment's petition clause is subject to the public concern analysis. Second, he argues that a writ should be granted because the Fifth Circuit has ignored precedent from this court construing the term public concern. As is shown below, there is no cause for review.

STATEMENT OF THE FACTS

Petitioner Alfred Short began working at the City of West Point Fire Department on January 16, 1992, as a Firefighter/ EMT. (R. at p. 147). At the time he began employment, he resided at Route 4, Box 196-C in Macon, Noxubee County, Mississippi. One of the minimum qualifications for the position with the fire department was that "Plaintiff [be] a resident of Clay County and reside no more than three (3) miles outside the city limits of West Point." (R. at pp. 59-60, newspaper advertisement recognizing requirement R. at p. 81). The City hired Petitioner

with the understanding that he would move into Clay County as soon as possible. (R. at p. 61).

Carradine Young was serving as Fire Chief for the City when Short joined the department. Young repeatedly reminded Short that his position with the fire department required him to move his residence to Clay County. (R. at pp. 61-63). In January or February of 1993, Short bought a house in Northgate Subdivision of the City of West Point. Respondent Richard Stripling took over for Carradine Young in April of 1994. (R. at p. 92). Although Short had purchased a house, it was common knowledge that he was not actually living in the house and Chief Stripling, as Young had previously, continued to urge Short to comply with the residence requirement. (R. at pp. 109-11; 112-14).[1]

In July of 1994, a position as Engineer/Pump Operator opened at the fire department. (R. at p. 113). Short applied for the job. After thorough consideration of the qualifications of each of the applicants, Chip Jones and Tony Lawson were chosen for the promotions in early October. (R. at pp. 113-14). Jones and Lawson were chosen over Short because they had several more years of experience with the fire department and because both had worked as backup pump operators in the past. (R. at pp. 94, 98-99, 113-14).[2]

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1. As further support for Respondents' belief that Petitioner did not actually live in Clay County, at all times relevant to this lawsuit, his vehicles had Noxubee County plates, he was registered to vote in Noxubee County, his driver's license showed Noxubee County as his home and his employment records reflected that he lived in Noxubee County. (R. at pp. 124-25; W-2's, R. at pp. 77-80).

2. At the time of the promotions, Jones had been working with the City of West Point Fire Department for nine years. He had served as a backup pump operator for some eight years. Lawson had been with the (Cont'd)

Short filed a claim with the EEOC on November 1, 1994, charging race discrimination against the City and Chief Stripling for failing to promote him. (R. at p. 84). The EEOC dismissed Short's claim of race discrimination on June 26, 1995. (Commission Determination R. at p. 85). Short received his Notice of a Right to Sue letter with the EEOC determination, but did not file a lawsuit under Title VII based on the promotion decision. (R. at p. 86).

Prior to the pump operator position opening, Chief Stripling had been questioning Short about his living arrangements and his intention to comply with the residence requirement for firefighters of the City of West Point. (R. at pp. 61-63, 112, 95-96). Short claimed he had moved into a house he bought in Northgate Subdivision in or around May of 1994, even though his family still resided in their Macon dwelling. (R. at p. 63, 147). After investigation by the Police Department, Chief Stripling determined that Short was not actually living in the residence. (R. at p. 113). On January 6, 1995, Dewel Brasher, the City's Chief Administrative Officer, wrote Short a letter setting out the repercussions of failing to comply with the residence requirement and, again, pleading with Short to comply. (R. at p. 72; letter, R. at p. 87). After meeting with Short in March of 1995, some five months after Short's EEOC charge, City Mayor Kenny Dill informed Short that he would be suspended effective immediately and that the Mayor would recommend his termination at the next Board of Aldermen meeting based on Short's continued refusal to move into Clay

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(Cont'd)
department for six years and eight months and had worked as a pump operator on an interim basis for approximately seven months. In contrast, Short had only been with the department for two years and eight months and had no experience in driving a fire truck or pump operation. Short's continued refusal to move his residence inside Clay County was also considered. (R. at pp. 95, 113-14).

County. (R. at pp. 75-76; letter, R. at p. 89). The letter specifically stated that the reason for this action was for his failure to comply with the long-standing City policy, and a condition of his original employment, that all employees of the West Point Fire Department be residents of Clay County or relocate to Clay County. (*Id.*).[3]

At the April 11 hearing before the Board of Mayor and Selectmen, Alfred Short was terminated by a unanimous vote of the Board members. (R. at p. 128).

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3. Short claimed in his Petition that "[o]fficials of the City of West Point expressed their disapproval of the filing of the EEOC charge." (Petition at p. 3). He went on to quote statements taken from his own deposition wherein he claimed that city officials spoke of their disapproval of his EEOC charge. Although irrelevant to the issues before this Court, the Respondent would note that city officials denied making any such statements and the record evidence shows that, both before and after Short's EEOC charge, city officials warned Short about the residence requirement and gave him ample opportunity to comply.

For example, the record evidence establishes that Dewel Brasher, one of the individual's Short claims expressed disapproval with his filing of the EEOC charge, wrote Short a letter in early January, some three months after Short's EEOC charge, and gave him an opportunity to comply with his residence obligations. (R. at p. 72; letter R. at p. 87). Short simply refused to comply and the City was forced to finally act.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD BE DENIED INASMUCH AS THE FIFTH CIRCUIT WAS CORRECT IN ITS HOLDING THAT THE PETITION CLAUSE OF THE FIRST AMENDMENT REQUIRES A SHOWING OF A PUBLIC INTEREST.

In affirming the district court, the Fifth Circuit held that Short must show that his underlying EEOC race charge involved a matter of public concern in order to be cognizable under the petition prong of the First Amendment. Petitioner argues that the "public concern" analysis should not be applied to cases involving the petition clause of the First Amendment and, therefore, should not be applied to his petition claim here. In support of his argument, he cites the Court to the Third Circuit decision of *San Filippo v. Bongiovanni*, 30 F.3d 424 (3rd Cir. 1994), which directly contradicts previous decisions of the Fifth Circuit and every other circuit court to consider the issue.[4]

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4. In *San Filippo*, the court recognized that each circuit to previously consider the issue had held that a public employee who alleges that he or she was disciplined in retaliation for having filed a lawsuit or grievance against his or her employer does not state a First Amendment claim unless the lawsuit or grievance addressed a matter of public concern. *San Filippo* at 439-40. The decision even listed in a footnote cases from other jurisdictions which required proof of a public concern in First Amendment petition cases. *Id.* at 440 n.19. The cases of *Day v. South Park Ind. Sch. Dist.*, 768 F.2d 696 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986), and *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989), were noted in the footnote as cases where the Fifth Circuit required plaintiff's to show a public concern under the petition clause of the First Amendment.

Petitioner argues that the Fifth Circuit has misapplied *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983), and that the public interest "balancing test" is inappropriate when the employee's speech consists of filing an EEOC charge. However, after *Connick*, this Court recognized that there is no distinction between the petition clause of the First Amendment and its other provisions. In *McDonald v. Smith*, 472 U.S. 479, 105 S. Ct. 2787, 86 L. Ed. 2d 384 (1985), the Court held that:

> The Petition Clause, however, was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater protection to statements made in a petition . . . than other First Amendment expressions.

McDonald, 472 U.S. at 485, 105 S. Ct. at 2791 (internal citations omitted). Petitioner's attempt to distinguish his petition claim from other protected First Amendment expressions has been rejected by this Court and there is no cause for further review.

All circuits, other than the Third, have specifically held that a public employee seeking redress under the right to petition prong of the First Amendment is required to establish a public interest. More particularly, the Fifth Circuit requires a plaintiff bringing a First Amendment action to establish a public interest where he claims retaliation for filing a grievance or a lawsuit. *See, e.g., Rathjen*, 878 F.2d at 842; *Day*, 768 F.2d at 701-03; *Brinkmeyer v. Thrall Independent School Dist.*, 786 F.2d 1291, 1296 (5th Cir. 1986).

All courts other than the Third Circuit have specifically recognized that a public employee seeking redress under the

right to petition prong of the First Amendment must establish a public interest. This Court in *McDonald* held that statements made in a petition should have no greater protection than any other First Amendment expressions. Petitioner's petition rests on arguments previously addressed and rejected by this Court and does not warrant review.

Of equal significance, as recognized by the Petitioner, Title VII specifically provides for protection from retaliation for filing an EEOC charge. A Title VII retaliation claim, as opposed to a First Amendment retaliation claim, does not require a public interest showing. *Petitioner had the opportunity to pursue his retaliation claim under Title VII by filing a charge of discrimination with the Equal Employment Opportunity Commission, but failed to do so.* (Petition at p. 4 n.2; Memorandum Opinion dismissing Title VII Retaliation Claim at pp. 7-9, Opinion and Order of Dismissal attached as Appendix A). *In other words, he had a readily available remedy but neglected to avail himself of the opportunity to pursue the same.*

II.

THE COURT OF APPEALS PROPERLY HELD THAT PETITIONER'S EEOC CHARGE WAS NOT A MATTER OF PUBLIC CONCERN.

Petitioner argues that the Fifth Circuit erred when it held that his EEOC claim here did not involve matters of public concern. He claims that charging a public body with race discrimination is a matter of public concern and that no further proof of public interest is necessary. His argument is without merit.

Petitioner relies on the decision of *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 58 L. Ed. 2d 619, 99

S. Ct. 693 (1979), in support of his argument. In *Givhan*, the Court held that First Amendment protection may apply even when a public employee arranges to communicate privately with his employer, rather than to express his views publicly. *Id.*, 439 U.S. at 415-16. The only issue in *Givhan* was the form of communication, the subject matter of her complaint was not at issue. Under the facts and circumstances at the time of her complaint, Givhan's statements concerning the school district's allegedly racially discriminatory policy involved a matter of public concern.[5] *See Connick*, 461 U.S. at 146 (Court recognized that the subject matter of Givhan's statements was not at issue, but noted that her statements concerning the school district's allegedly racially discriminatory policy was clearly a public concern). Here, in contrast to *Givhan*, the subject matter of Short's EEOC claim was personal and private in nature. The private communication of the complaint was only one factor that supported dismissal of Short's claim. As distinguished from the plaintiff in *Givhan*, not only was Short's complaint lodged in private but, the subject matter of Short's complaint was private, he brought the charge for personal reasons, and the relief he sought (a promotion) was personal in nature. Short's EEOC complaint was private and personal and not protected by the First Amendment.

Courts have consistently determined the issue of public versus private concern on a case-by-case basis.

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5. The Court in *Givhan* was considering a retaliation claim that involved a school teacher's (employee) statements concerning allegedly racially discriminatory policies at the Western Line Consolidated School District (employer). At the time of the petitioner's complaint and termination, the district was the subject of a desegregation order entered by the United States District Court of Mississippi. *Givhan*, 439 U.S. at 411. The content, context and form of Givhan's petition claim was of public concern.

> The issue of whether an employee's speech involves a matter of "public concern" is a slippery inquiry, one which defies precise definition. It thus requires a case-by-case analysis, with careful consideration of the content, context and form of the statement.

Stewart v. Parish of Jefferson, 951 F.2d 681, 683 (5th Cir. 1992) (citing *Kirkland v. Northside Independent School Dist.*, 890 F.2d 794, 798 (5th Cir. 1989).

In *Terrell v. Univ. of Texas Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987), the court discussed the importance of a case-by-case analysis in the public employment context:

> Because almost anything that occurs within a public agency *could* be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. **Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in his role as employee. In making the determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.**

Id. at 1362 (internal footnotes omitted). Petitioner's argument that discrimination claims are "as a matter of law" of public interest without any further proof of a public motive directly contradicts precedent and should be rejected.

In *Ayoub v. Texas A&M Univ.*, 927 F.2d 834 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991), which is controlling here, the Fifth Circuit addressed an argument almost identical to Short's

argument here. In *Ayoub*, plaintiff sued the University under the First Amendment alleging that he was relocated in retaliation for bringing an the EEOC charge of discrimination based on the pay-scale in place at the University. He claimed the University was discriminating against him because of his national origin and that such discrimination was of public concern. The court found that it was clear that Ayoub's speech did not involve a matter of public concern and focused only on individual compensation. *Id.* at 837. The court summarized by stating that

> the indisputable facts found in the record remain that Ayoub consistently spoke not as a citizen upon matters of public concern, but rather as an employee upon matters of only personal interest.

Id. Ayoub's claims are virtually identical to those of Short here.

There is no evidence that Short expressed concern about anything other than his own promotion to the Engineer/Pump Operator position. His motivation was clearly personal and he has offered no proof to the contrary. He was concerned solely with his personal employment situation. He has never alleged that there was a generalized pattern or policy of discrimination in the West Point Fire Department. Although race discrimination can be a matter of public concern, in the context presented here by Short, the discrimination complained of was purely personal and private and addressed only his personal employment condition. Therefore, he has no retaliation claim under the First Amendment and this claim was properly dismissed.

CONCLUSION

The Petitioner requests that the Court review the issue of whether the petition prong of the First Amendment requires proof

of a public interest. As discussed above, this Court has previously held that statements in a petition, here an EEOC charge, are no more protected than other First Amendment expressions. Therefore, as found by all circuits other than the Third, plaintiffs bringing claims under the petition clause of the First Amendment must prove a public interest. As this Court has previously considered and rejected similar arguments, there is no need for review of this question and this petition should be denied.

Secondly, this Court and all circuit courts have consistently determined proof of a public interest on a case-by-case basis. The content, context and form of Petitioner's EEOC charge here was purely private and personal in nature. His EEOC charge was primarily as an employee and not as a citizen and review is not warranted. Simply put, this Petition raises no issues that warrant review and should be denied.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION FILED DECEMBER 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CAUSE NO. 1:95CV359-D-D

ALFRED SHORT

PLAINTIFF

VS.

CITY OF WEST POINT, MS and RICHARD STRIPLING, Individually and in his Official Capacity as Fire Chief of the City of West Point

DEFENDANTS

MEMORANDUM OPINION

This cause comes before the court upon the motion of the defendants for summary judgment in their favor against the plaintiff's claims. The plaintiff has sued the City of West Point, Mississippi and Richard Stripling, individually and in his official capacity as fire chief of West Point, alleging violations of Title VII of the Civil Rights Act of 1964, the First Amendment to the United States Constitution, 42 U.S.C. §§ 1981 and 1983. Plaintiff's Complaint ¶ VIII. The defendants moved for dismissal or, in the alternative, summary judgment on the grounds that (1) this court lacks jurisdiction over the plaintiff's Title VII claims due to the plaintiff's failure to exhaust his administrative remedies; (2) the plaintiff's First Amendment claim should be

dismissed because Title VII offers the exclusive remedy for retaliation for filing an EEOC claim; (3) the claims against defendant Stripling in his individual capacity have no factual basis; (4) the claims against defendant Stripling in his official capacity are duplicative since the City of West Point is a properly named defendant; and (5) the defendants are otherwise entitled to a judgment as a matter of law on all claims. The plaintiff has responded and this motion is ripe for determination.

FACTUAL BACKGROUND[1]

The City of West Point ("the City") hired plaintiff Alfred Short as a firefighter and an emergency medical technician (EMT) for the West Point Fire Department in January 1992. Although one of the qualifications for employment required firefighters to "[b]e a resident of Clay County and reside no more than three (3) miles outside the City Limits of West Point," the plaintiff resided in Macon, Noxubee County, Mississippi, when he began his employment with the City. Exh. 2 att. Short Depo., July 17, 1996. The City hired him with the understanding that he would soon move into Clay County. Short Depo., July 17, 1996 at 34.

In January or February of 1993, Short bought a house in the Northgate Subdivision of the City and moved into it in early spring of 1994.[2] Shortly afterwards, in April 1994, defendant

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1. In a motion for summary judgment, the facts must be construed in the light most favorable to the non-moving party. *Matagorda County v. Russel Law*, 19 F.3d 215, 217 (5th Cir. 1994). The court's recitation of the facts in this case reflects this rule.

2. The defendants vehemently dispute this date and contend that neither Short nor his family ever resided in West Point until after the time relevant to this lawsuit. Defendants' Brief in Support of Motion for Summary Judgment at 5.

Stripling replaced Caradine Young as Fire Chief for the City. In July 1994, an Engineer/ Pump Operator position opened at the fire department. The qualifications for this promotion were listed[3] and the plaintiff applied for the job. He sat for the written test and also participated in an oral interview.

Short scored the highest on the written exam out of the six applicants. Nevertheless, Chip Jones and Tony Lawson, white co-employees of the plaintiff and fellow applicants, were awarded the promotion in October 1994. The plaintiff filed a claim with the EEOC the first of November leveling a race discrimination charge against the City and Chief Stripling for failure to promote the plaintiff. The EEOC dismissed Short's claim of race discrimination on June 6, 1995, after finding that Jones and Lawson were more qualified due to the consideration of factors other than the written exam such as experience and job performance.

Even before the pump operator position opened up, Chief Stripling had been questioning the plaintiff about his living arrangements and his intention to comply with the residence requirements for firefighters of the City. The plaintiff claimed that he had moved into the house he bought in the Northgate Subdivision on or around March 1994, even though his family still resided in their Macon dwelling. Defendant Stripling

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3. Short testified by deposition that factors such as seniority and experience were not initially listed as weighing heavily in the promotion determination. Short Depo., July 17, 1996 at 47. However, he does not dispute that the final percentages allotted each factor were posted prior to the date of the written exam. *Id.* The applicant's written test score and his years of experience counted 70%, while leadership abilities and the oral interview accounted for the remaining 30%. Exh. 1 att. Sripling Aff., Oct. 4, 1996.

requested the police to investigate the matter and report back to him. Apparently dissatisfied with the reports, Dewel Brasher, the City's Chief Administrative Officer, wrote the plaintiff a letter of warning setting out the repercussions of failing to abide by the residence requirement. After meeting with the plaintiff in March 1995 to discuss the matter further, City Mayor Kenny Dill informed Short that he was suspended effective immediately and that the Mayor would recommend his termination to the City Board based on the plaintiff's abrogation of the residence requirement. Per such recommendation, the Board voted to terminate the plaintiff's employment on April 11, 1995. The plaintiff filed this cause of action on November 24, 1995.

LEGAL DISCUSSION

I. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." F.R.C.P. 56(c). The party seeking summary judgment carries the burden of demonstrating that there is an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *Vera v. Tue*, 73 F.3d 604, 607 (5th Cir. 1996). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Brothers v. Klevenhagen*, 28 F.3d 452, 455 (5th Cir. 1994). "Where the record, taken as a whole, could not lead a rational trier of fact

to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986); *Federal Sav. & Loan Ins. v. Krajl*, 968 F.2d 500, 503 (5th Cir. 1992). The facts are reviewed drawing all reasonable inferences in favor of the party opposing the motion. *Banc One Capital Partners Corp. v. Kniepper*, 67 F.3d 1187, 1198 (5th Cir. 1995); *Matagorda County v. Russel Law*, 19 F.3d 215, 217 (5th Cir. 1994).

II. CLAIMS ADDRESSED

As an initial matter, the court addresses the matter of which of the plaintiff's claims are properly before it pursuant to the defendants' motion for summary judgment or dismissal. The plaintiff asserts that the defendants have moved for summary judgment only as to the retaliation claims and not as to any claim in regard to the failure to promote. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment at 9. While the defendants' motion itself only references the retaliation claims, it is apparent from reading the defendants' supporting brief that the defendants intended their motion as one requesting dismissal of the entire case. Although the defendants apparently considered the plaintiff's complaint as only properly raising a retaliation claim, the defendants provided adequate notice to the plaintiff of their position that the plaintiff's Title VII claim of race discrimination for failure to promote is procedurally barred. Defendants' Brief in Support of Motion for Summary Judgment at 4 & n.3, 13 n.8. The court shall address this claim in addition to the plaintiff's retaliation claims. The defendants argue in their rebuttal brief that the plaintiff did not raise a § 1981 claim in his complaint for failure to promote. Although the plaintiff certainly highlighted his failure to promote claim as being

brought under Title VII, the court is of the opinion that the plaintiff provided adequate notice of his intention to also state a claim under § 1981.[4] However, because the defendants did not move for summary judgment as to this claim, except in their rebuttal brief,[5] the court shall not address it.

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4. Paragraph Eight of the Complaint provides:

> This Court has federal question jurisdiction under 28 USC 1343 to address claims under the Civil Rights Act of 1964, under the United States Constitution, Amend. 1, under 42 USC Sec. 1981, and under 42 USC Sec. 1983.

Plaintiff's Complaint ¶ 8.

5. Even if this court were to address the issue, the undersigned does not believe that the plaintiff's § 1981 claim is barred. The defendants contend that the § 1981 claim should be dismissed because

> "where the plaintiff has alleged violations of both Title VII and § 1981, the court as [a] rule, will consider an alternative remedy brought under § 1981 only if violation of that statute can be made out on grounds different from those available under Title VII. . . . Plaintiff has raised no different grounds here. Accordingly, his § 1981 race claim . . . should be dismissed."

Defendants' Rebuttal Brief at 5. The Fifth Circuit, in *Parker v. Mississippi St. Dep't of Pub. Welfare*, stated that specific consideration of alternate remedies for employment discrimination (i.e., § 1983 and § 1981) is only necessary if a violation may be made out on grounds different from those under Title VII. 811 F.2d 925, 927 n.3 (5th Cir. 1987). However, the appellate court later clarified that language:

> In *Parker* we did no more than limit our appellate review

(Cont'd)

(Cont'd)

> of the denial of Title VII relief to the facts alleged in support of that claim, doing so because the claims alleged under Title VII and § 1981 were provable by the same facts. Thus a finding of liability or non-liability under one statute satisfied the other. . . . *Parker* does not stand for the proposition, nor could it properly do so, that a claimant alleging racial discrimination in an employment setting is limited to recovery under Title VII.

Hernandez v. Hill Country Tele. Co-op., 849 F.2d 139, 142-43 (5th Cir. 1988). The *Hernandez* Court cited the Supreme Court opinion of *Johnson v. Railway Express Agency* extensively. *See* 421 U.S. 454, 95 S. Ct. 1716, 44 L.Ed.2d 295 (1975). The plaintiff in *Johnson* had filed both a Title VII claim and a § 1981 claim. The Court noted that

> [d]espite Title VII's range and its design as a comprehensive solution for the problem of invidious discrimination in employment, the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief. . . . [T]he remedies available to the individual under Title VII are co-extensive with the individual's right to sue under the provisions of [42 U.S.C. § 1981] and the two procedures augment each other and are not mutually exclusive. . . .
>
> We generally conclude, therefore, that the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent.

Johnson, 421 U.S. at 459, 461, 44 L.Ed.2d 301, 302. The court will not bar the plaintiff's § 1981 failure to promote claim simply because the same claim under Title VII is procedurally barred when § 1981 itself contains no procedural prerequisites and is a valid and independent avenue for relief.

Appendix A

III. TITLE VII CLAIMS

A. Failure To Promote

It is undisputed that the plaintiff filed a charge with the EEOC on November 1, 1994, alleging race discrimination in regard to the City's and Chief Stripling's failure to promote the plaintiff. On June 6, 1995, the EEOC dismissed the charge and notified Short of his right to sue in federal court. Short had ninety (90) days from the receipt of his right to sue letter to file suit in federal court under Title VII for race discrimination in regard to his failure to promote claim. The plaintiff did not file suit until November 24, 1995 — more than 90 days subsequent to the receipt of the EEOC notice. The plaintiff concedes this fact.[6] Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 9 n.1. As such, the plaintiff is barred from bringing a claim for race discrimination under Title VII in regard to the defendants'

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6. It appears the plaintiff concedes the dismissal of his Title VII failure to promote claim. Although aware of the defendants' position that the plaintiff's Title VII failure to promote claim is procedurally barred, the plaintiff failed to argue or present proof that the claim could proceed under the auspices of waiver or estoppel. *Espinoza v. Missouri Pacific R. Co.*, 754 F.2d 1247, 1249 n.1 (5th Cir. 1985) (noting 90-day limit not jurisdictional, but subject to waiver and estoppel). Furthermore, as noted *supra* when addressing the jurisdictional question of this court's authority to entertain the plaintiff's Title VII retaliation claim, the plaintiff argued that the court has ancillary jurisdiction over the claim due to the plaintiff's § 1981 claim for race discrimination. The plaintiff failed to mention any Title VII claim for failure to promote to which a retaliation claim could attach itself. Plaintiff's Brief in Opp. to Mot. for Summary Judgment at 11. The court is of the opinion that the plaintiff had notice that the defendants were moving for summary judgment as to the Title VII failure to promote claim and that no genuine issue of material fact exists which precludes a ruling on this claim.

failure to promote him. This claim of the plaintiff shall be dismissed.

B. Retaliation

In addition to a failure to promote claim under Title VII, the plaintiff has brought a retaliation claim under Title VII alleging the defendants fired him in retaliation to his filing a claim with the EEOC. The plaintiff did not file a claim with the EEOC regarding the allegedly retaliatory termination of his employment. As such, the defendants contend that this court lacks jurisdiction over the plaintiff's retaliation claim brought pursuant to Title VII.

Courts lack jurisdiction to consider claims under Title VII unless the aggrieved party has first exhausted his administrative remedies. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995); *National Ass'n of Govern. Emp. v. City Pub. Serv.*, 40 F.3d 698, 711 (5th Cir. 1994); *Clark v. Kraft Foods, Inc.*, 18 F.3d 1279, 1279 (5th Cir. 1994). The Fifth Circuit has recognized one exception to this exhaustion requirement that is relevant in the case at bar. In *Gupta v. East Tex. State Univ.*, the appellate court held that

> it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a retaliation claim growing out of an earlier charge; the district court has ancillary jurisdiction to hear such a claim *when it grows out of an administrative charge that is properly before the court.*

654 F.2d 411, 411 (5th Cir. Unit A Aug. 1981) (emphasis added); *Barrow v. New Orleans S.S. Ass'n*, 932 F.2d 473, 479 (5th Cir. 1991).

The plaintiff contends that "ancillary" jurisdiction is not the only avenue through which this court may properly entertain his retaliation claim. As neither *Barrow* nor *Gupta* explicitly stated that ancillary jurisdiction was the **sole** source of a court's authority over a retaliation claim not filed with the EEOC, the plaintiff takes the position that 28 U.S.C. § 1343 also provides this court with jurisdiction over such a claim. However, the plaintiff directs this court's attention to no authority for that proposition and the court's own research unearthed no such holding. Section 1343 merely grants district courts original jurisdiction over civil rights actions. However, 42 U.S.C. § 2000e-5(f) specifically confers upon district courts jurisdiction over Title VII claims. *McMiller v. Bird & Son, Inc.*, 68 F.R.D. 339, 340 (W.D. La. 1975) (noting 28 U.S.C. § 1343 conferred jurisdiction over § 1981 claim while 42 U.S.C. § 2000e-5(f) conferred jurisdiction over Title VII claim). Section 1343 may not be used as an end run around the prerequisites for jurisdiction contained in Title VII. Otherwise, the court can discern no reason why Congress would include prerequisites such as those contained within § 2000e-5(f) if § 1343 could also bestow jurisdiction without the plaintiff complying with the listed requirements.

In the alternative, the plaintiff submits that this court has ancillary jurisdiction over his retaliation claim because the court has jurisdiction over his race claim under 42 U.S.C. § 1981. The § 1981 claim has no impact on this court's jurisdiction over the plaintiff's retaliation claim under Title VII. As the *Gupta* Court held and the *Barrow* Court subsequently reaffirmed, a district court has ancillary jurisdiction to hear a retaliation claim not filed before the EEOC " 'when it grows out of an *administrative charge* that is *properly* before the court.' " *Barrow*, 932 F.2d at 479 (first emphasis added) (quoting *Gupta*,

654 F.2d at 414). This court interprets *Gupta* and *Barrow* as setting out the narrow holding that a retaliation claim not filed with the EEOC must attach itself to an otherwise properly filed Title VII claim in order for the court to have jurisdiction to hear it. The fact that race discrimination claims other than those filed pursuant to Title VII are properly before the court does not vest the court with authority over a retaliation claim not filed with the EEOC. As the court noted *supra*, the plaintiff has no administrative charge properly before the court. Thus, this court has no ancillary jurisdiction to hear the plaintiff's Title VII retaliation claim and it shall be dismissed.

IV. FIRST AMENDMENT CLAIM

A. Title VII and § 1983

The defendants have moved for the dismissal of Short's First Amendment claim on the basis that Title VII provides the exclusive remedy for a retaliation claim. The plaintiff disputes this argument and submits that Title VII does not bar a separate claim under 42 U.S.C. § 1983[7] for violation of a constitutional right. In his Complaint, the plaintiff stated that

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7. Section 1983 provides in relevant part that

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

> Additionally, firing Plaintiff because he filed an EEOC charge violated his free speech rights and the right to petition the government for redress of grievances, protected by the United States Constitution, Amend. 1.

Plaintiff's Complaint ¶ IX. The defendants contend that "[a]lthough Plaintiff attempts to label these claims as First Amendment claims, they are essentially retaliation claims cognizable only under Title VII." Def.'s Brief in Support of Motion at 11. In support of this statement, the defendants cite several cases. *See, e.g., White v. General Servs. Ad.*, 652 F.2d 913, 917 (9th Cir. 1981); *Patel v. Derwinski*, 778 F. Supp. 1450, 1457 (N.D. Ill. 1991); *Washington v. United States Postal Serv.*, 1990 WL 119506 (N.D. Ill. 1990); *Munoz v. Orr*, 559 F. Supp. 1017, 1019-20 (W.D. Tex. 1983). Each of the cited cases, however, stand for the proposition that Title VII is a **federal** employee's exclusive remedy in this type of a situation. This court agrees that "[t]itle VII provides the exclusive remedy for employment discrimination claims raised by federal employees." *Jackson v. Widnall*, 99 F.3d 710, 715 (5th Cir. 1996) (citing *Brown v. General Servs. Admin.*, 425 U.S. 820, 835, 96 S. Ct. 1961, 1969, 48 L.Ed.2d 402 (1976); *Rowe v. Sullivan*, 967 F.2d 186, 189 (5th Cir. 1992)). One of the shortfalls of the defendants' argument is that Mr. Short was not a federal employee, but instead was employed by the City of West Point. *See Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1575 (5th Cir. 1989).

The defendants' second shortfall is their misinterpretation of the recent Fifth Circuit opinion in *Jackson v. City of Atlanta, Tx.*, 73 F.3d 60 (5th Cir. 1996). In that case, the court reaffirmed its holding in *Irby v. Sullivan*[8] that a "violation of Title VII cannot

8. 737 F.2d 1418 (5th Cir. 1984).

also support a § 1983 suit." *Jackson*, 73 F.3d at 63. The defendants read this language as precluding the plaintiff's First Amendment claim brought under § 1983. In *Jackson*, the basis for the plaintiff's § 1983 claim was the alleged violation of Title VII. *Id.* at 61 and 63. The court held that the § 1983 claim should be dismissed since § 1983 does not create any substantive rights itself but only provides a remedy for the violation of federal substantive rights and "§ 1983 is not available when 'the governing statute provides an exclusive remedy for violations of its terms.' " *Id.* at 63 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S. Ct. 1531, 1545-46, 67 L.Ed.2d 694 (1981)). Because Jackson's § 1983 claim hinged on a violation of Title VII and Title VII provides an exclusive remedy for violations of its terms, the court dismissed the § 1983 claim.

Mr. Short's § 1983 claim does not hinge on an alleged violation of Title VII. Instead, the substantive federal right he submits the defendants infringed upon is his freedom of speech protected under the First Amendment. As noted by the *Jackson* Court, a plaintiff may

> pursue a remedy under § 1983 as well as under Title VII when the employer's conduct violates both Title VII and a *separate constitutional or statutory right.*

Id. at 63 n.13 (emphasis in original). The First Amendment sets out a constitutional right separate from what Title VII protects and the plaintiff is not precluded by *Jackson* from asserting a § 1983 claim under these facts.

B. Public Concern

In their rebuttal memorandum, the defendants assert in the

alternative that the plaintiff's First Amendment claim should be dismissed because the plaintiff's EEOC complaint does not involve a matter of public concern. As noted *supra*, the plaintiff alleges that the defendants violated his First Amendment rights by firing him in retaliation for his filing an EEOC complaint against them. As the plaintiff was a public employee at the time in question, the First Amendment only protects his speech if it involves a matter of public concern. *Wallace v. Texas Tech. Univ.*, 80 F.3d 1042, 1050 (5th Cir. 1996). In determining whether certain speech falls into that protected classification, courts must look to the content, form, and context of the speech. *Wallace*, 80 F.3d at 1050 (citing *Thompson v. City of Starkville*, 901 F.2d 456, 461 (5th Cir. 1990)). If Short's speech was primarily in his role as employee as compared to primarily in his role as citizen, the speech generally is not of public concern. *Id.*

> The courts will not interfere with personnel decisions when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.

Id. (quoting *Page v. DeLaune*, 837 F.2d 233, 237 (5th Cir. 1988); *Connick v. Myers*, 461 U.S. 138, 147, 103 S. Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)).

After examining the plaintiff's EEOC charge of discrimination, it appears that this argument of the defendants may indeed have merit. *See Ayoub v. Texas A & M Univ.*, 927 F.2d 834, 836-38 (5th Cir.), *cert. denied*, 502 U.S. 817 (1991). However, the defendants did not provide the plaintiff with notice of this basis for dismissal of the plaintiff's First Amendment retaliation claim. As pointed out *supra*, the defendants raised this issue only in their rebuttal brief. Thus, the court is of the

opinion that the plaintiff should have an opportunity to respond to this matter and shall grant him additional time in which to do so before the court again takes up this issue.

V. CLAIMS AGAINST DEFENDANT STRIPLING

The defendants also submit that the claims against defendant Fire Chief Stripling in his individual and official capacities should be dismissed. The defendants argue that the official capacity claims should be dismissed because the City is a properly named defendant and such claims are merely duplicative. The plaintiff did not address this issue and the court finds this contention well taken and shall dismiss the claims against defendant Stripling in his official capacity.

As to the retaliation claim against Chief Stripling in his individual capacity, the defendants submit that (1) the Chief did not make the recommendation nor the final decision of dismissal of the plaintiff, and in the alternative (2) Stripling, as a public official in Mississippi, is entitled to qualified immunity for discretionary acts which he performs in his official capacity as Fire Chief. The court is of the opinion that genuine issues of material fact exist which preclude the court from granting judgment as a matter of law as to the plaintiff's First Amendment retaliation claim against Stripling in his individual capacity. Although Stripling may not have participated in the final decision to dismiss the plaintiff, there appears to be a genuine issue of material fact as to whether Stripling's actions proximately contributed to the termination of the plaintiff's employment with the City. As such, Stripling is not entitled to a judgment as a matter of law as to the plaintiff's retaliation claim against him in his individual capacity. *See Boddie v. City of Columbus*, 989 F.2d 745 (5th Cir. 1993).

In the alternative, the defendants submit that Stripling is entitled to state law qualified immunity because any decisions relative to Short's employment were discretionary acts which Stripling performed in his official capacity. Stripling's claim of entitlement to state law immunity is unavailing as violative of the Supremacy Clause. *Howlett v. Rose*, 496 U.S. 356, 375-83, 110 L.Ed.2d 332, 353-58, 110 S. Ct. 2430 (1990) (finding state law immunities have no force in § 1983 suits "over and above" those provided in § 1983); *see also Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law."); *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 75 (2d Cir. 1992) (same); *Walker v. Norris*, 917 F.2d 1449, 1458 (6th Cir. 1990) ("State law cannot provide immunity with regard to section 1983 claims."); *Hufford v. Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990) ("[S]tate immunity . . . has no application to claims in federal court under section 1983."), *cert. denied*, 499 U.S. 921, 111 S. Ct. 1312, 113 L.Ed.2d 246 (1991). At this juncture, Stripling is not entitled to a judgment as a matter of law in his favor against the plaintiff's First Amendment retaliation claim.

VI. RETALIATION CLAIM AGAINST THE CITY

The defendants also assert that the City is entitled to summary judgment against the plaintiff's First Amendment retaliation claim. As with the claim against Stripling in his individual capacity, the court finds that genuine issues of material fact exist which prevent the entry of a judgment as a matter of law on this claim. To make out a *prima facie* case of retaliation, the plaintiff must demonstrate that: (1) he participated in a statutorily protected activity; (2) he received an adverse employment action; and (3) a causal connection exists between

the protected activity and the adverse action. *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995). The defendants submit that the plaintiff has failed to create a material fact issue as to the third element of causation. However, in a summary judgment motion, the burden is initially on the movant to demonstrate that no genuine issues of material fact exist which preclude the entry of a judgment as a matter of law. The court is of the opinion that the defendants have not met their burden in this case. Short testified by deposition that defendant Stripling told him he was "digging a hole for himself" by filing with the EEOC and that Dewel Brasher, the City's Chief Administrative Officer, informed Short that the City was planning on talking with Short about his residence but refused to do so after he filed a claim. Short Depo., July 17, 1996 at 86, 88. These comments alone indicate that summary judgment is inappropriate at this time.[9]

VII. PUNITIVE DAMAGES

The final matter before the court is the argument by the defendants that the plaintiff is not entitled to punitive damages as a matter of law and this claim should be dismissed. Punitive damages are indeed recoverable under §§ 1983 and 1981. *Smith v. Wade*, 461 U.S. 30, 56, 103 S. Ct. 1625, 1640, 75 L.Ed.2d 632 (1983); *Hale v. Fish*, 899 F.2d 390, 404 (5th Cir. 1990). However, the awarding of such damages is not available against a municipal defendant. *City of Newport v. Fact Concerts, Inc.*,

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9. The defendants further submit that they have articulated a legitimate nonretaliatory reason for their decision to terminate the plaintiff's employment, that being his alleged refusal to comply with the residency requirement. The court is of the opinion, however, that the plaintiff has demonstrated that genuine issues of material fact exist as to whether this reason is pretextual and whether his employment would have been terminated "but for" his protected activity.

453 U.S. 247, 267, 101 S. Ct. 2748, 2760, 69 L.Ed.2d 616 (1981) ("A municipality . . . can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself."); *Webster v. City of Houston*, 735 F.2d 838, 860 n.52 (5th Cir. 1984); *Walters v. City of Atlanta*, 803 F.2d 1135, 1148 (11th Cir. 1986). As such, the plaintiff's punitive damages claim against the City of West Point shall be dismissed. The defendants also moved for summary judgment as to the punitive damages claim against Chief Stripling individually on state immunity grounds. However, as the court set out *supra*, state law immunity defenses are no bar to federal liability and Chief Stripling is not entitled to a judgment as a matter of law on this basis. The court declines to address the factual merits of the plaintiff's punitive damages claim against Stripling in his individual capacity because the defendants did not move for a judgment as a matter of law on this predicate. However, the defendants are entitled to summary judgment in their favor in regard to the punitive damages claim against the municipal defendant and those claims shall be dismissed.

CONCLUSION

The court finds the motion of the defendants for summary judgment partially well taken and it shall be granted in part and denied in part. The court is of the opinion that the plaintiff properly raised a claim under § 1981 in his Complaint and the defendants did not move for summary judgment as to this claim. As such, the court shall not address the merits of the plaintiff's § 1981 claim of failure to promote and it shall be allowed to stand. The defendants did provide adequate notice to the plaintiff of their position with regard to the plaintiff's Title VII claim for failure to promote and the court finds that this claim is

procedurally barred and it shall be dismissed. As there is no administrative charge properly before the court to which the plaintiff's Title VII retaliation claim could attach, dismissal as to this claim is also proper. The defendants' argument against the survival of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern appears to have potential merit; however, the plaintiff shall have an opportunity to respond to this matter before the court addresses it. As to the factual merits of the plaintiff's First Amendment claim, the court is of the opinion that genuine issues of material fact exist which preclude granting a judgment as a matter of law in favor of the City or defendant Stripling on this claim. Finally, the City is entitled to a judgment as a matter of law as to the plaintiff's claim for punitive damages against it and this claim shall be dismissed.

A separate order in accordance with this opinion shall issue this day.

THIS 17th day of December 1996.

s/ Glen H. Davidson
United States District Judge

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CAUSE NO. 1:95CV359-D-D

ALFRED SHORT

PLAINTIFF

VS.

CITY OF WEST POINT, MS and RICHARD STRIPLING, Individually and in his Official Capacity as Fire Chief of the City of West Point

DEFENDANTS

ORDER GRANTING IN PART MOTION FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, the court upon due consideration of the defendants' motion for summary judgment finds the motion partially well taken and shall grant it in part and deny it in part. Therefore, it is ORDERED that:

1) the plaintiff's racial discrimination claim of failure to promote brought pursuant to Title VII is hereby DISMISSED. This order does not address the plaintiff's failure to promote claim brought pursuant to 42 U.S.C. § 1981.

2) the plaintiff's retaliation claim brought pursuant to Title VII is hereby DISMISSED.

Appendix A

3) the plaintiff's punitive damages claims against the municipal defendant City of West Point are hereby DISMISSED.

4) the claims of the plaintiff against defendant Richard Stripling in his official capacity are hereby DISMISSED as duplicative.

5) the plaintiff shall have fifteen (15) days from the date of this order in which to respond to the defendants' argument for dismissal of the plaintiff's First Amendment retaliation claim on the basis that the plaintiff's speech did not involve a matter of public concern. The defendants shall then have five (5) days in which to submit their rebuttal and the court shall take up this matter again after that time.

6) the remainder of the defendants' motion for summary judgment is hereby DENIED.

7) the court clerk shall file as part of the court record the defendants' memorandum brief in support of their motion to dismiss or for summary judgment, the plaintiff's memorandum brief in opposition to the defendants' motion for summary judgment, and the defendants' rebuttal memorandum brief.

All memoranda, depositions, affidavits and other matters considered by the court in partially granting the defendant's motion for summary judgment are hereby incorporated and made a part of the record in this cause.

SO ORDERED this 17th day of December 1996.

s/ Glen H. Davidson
United States District Judge